

in the Phoenix MSA as its petition requests,⁵⁷ US WEST's rates in the Phoenix MSA would no longer be subject to oversight. US WEST could simply drop those prices substantially (even below cost of service⁵⁸) and subsidize those predatory prices with rate increases in the rest of US WEST service territory where it remains the dominant carrier with a captive customer base. Given US WEST's own admission that it will remain dominant in other territories,⁵⁹ US WEST should be able to execute an effective predatory pricing scheme.⁶⁰ This predatory pricing plan is particularly insidious because US WEST can effectuate the plan without regulatory scrutiny as long as the rates charged in its tariff stay within the confines of the price cap index. And with 16 million access lines, US WEST certainly could stay within the price cap indices to cross-subsidize its predatory activities in the Phoenix MSA. Just as problematic is the fact that small

⁵⁶(...continued)
minimal savings in its external relations account.

⁵⁷ *US WEST Petition* at 35 (requesting forbearance from §§ 61.41-.49 which establishes the price cap regime).

⁵⁸ Changes that result in rates below the lower limit of a particular service band index are not lawful because of the potential for predatory pricing. *See Price Cap Performance FNPRM* at ¶ 11.

⁵⁹ *See US WEST Petition* at 13.

⁶⁰ The Supreme Court has recognized that predatory pricing schemes are "rarely tried, and even more rarely successful." *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). However, cross-subsidization of predatory pricing certainly is possible in industries in which one provider has a dominant market position particularly if that dominant position stems from its status as a regulated public utility. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-79; *California v. FCC*, 905 F.2d 1217, 1233-38 (9th Cir. 1990), *cert. denied*, 115 S. Ct. 1427 (1995).

businesses who require high capacity services⁶¹ in places like Denver and Seattle and Minneapolis will have to pay more so that US WEST can “compete” in the Phoenix MSA. GST sees no reason why small business customers in other US WEST territories should have to subsidize US WEST’s efforts to enhance its already dominant position in the Phoenix MSA. Certainly, the customers in these other US WEST jurisdictions gain no benefit from its activities in the Phoenix MSA.

Ultimately, if US WEST’s predation is successful, it will eliminate the other facilities-based competitors in the Phoenix MSA. The long-term consequences of a single monopoly provider of telecommunications service were the primary impetus behind the enactment of the Telecommunications Act.⁶²

The FCC imposed a comprehensive price cap regime in an effort to forestall potential cross-subsidization of unregulated service through rate increases in regulated services.⁶³ If the FCC granted this petition, it would essentially eviscerate those protections and allow US WEST to cross-subsidize its Phoenix operations with revenue from captive customers. Unless US WEST was willing to establish a structurally-separate subsidiary,⁶⁴ GST sees no way for the

⁶¹ US WEST, citing the *AT&T Order*, contends that purchases of high capacity service do not need protection because they are sophisticated and can obtain service from other carriers. *Id.* at 23-25. The only problem with that argument is that it is wrong. Many small businesses which include the vast majority of interexchange carriers and ISPs require high capacity services.

⁶² S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

⁶³ *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580-81 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993).

⁶⁴ GST does not believe that a structurally separate subsidiary for US WEST’s high
(continued...)

FCC to police potential cross-subsidization. Therefore, the grant of the forbearance petition cannot be in the public interest because it will not protect competition or promote the development of facility-based competitors.

VII. US WEST Cannot Rely on the *Hyperion Order* to Support its Claim that Forbearance will be in the Public Interest

In the *Hyperion Order*, the FCC found that CLECs cannot charge supracompetitive prices for access services because they do not possess market power.⁶⁵ The FCC then determined that the absence of market power would ensure that customers are protected.⁶⁶ These two findings led to the inevitable conclusion that permissive detariffing would be in the public interest for CLECs.⁶⁷ The FCC specifically excluded ILECs from consideration due to their market power.⁶⁸

US WEST attempts to argue that the rationale underpinning the FCC's *Hyperion Order* applies to its provision of high capacity service.⁶⁹ However, as GST has already painstakingly demonstrated, US WEST has market power, control over bottleneck facilities, and

⁶⁴(...continued)

capacity services in the Phoenix MSA will act as an appropriate safeguard against cross-subsidization. See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, GST Comments 11-15 (Filed Sept. 25, 1998). GST hereby incorporates that portion of those comments in this proceeding.

⁶⁵ 12 FCC Rcd at 8608-09.

⁶⁶ *Id.* at 8609-10.

⁶⁷ *Id.* at 8610.

⁶⁸ *Id.* at 8608, 8612.

⁶⁹ *US WEST Petition* at 35-38, 41.

the capability to cross-subsidize competitive services with noncompetitive services. Thus, the primary finding needed to come within the ambit of *Hyperion Order* -- the lack of market power -- has not been established. Therefore, the FCC must reject US WEST's efforts to come within the deregulatory confines of the *Hyperion Order*.

VIII. Conclusion

The FCC cannot grant a petition for forbearance unless it finds: 1) enforcement is not necessary to ensure that rates and practices are just, reasonable, and nondiscriminatory; 2) enforcement is not necessary to protect consumers; and 3) forbearance will be in the public interest. The FCC can make none of those findings with respect to US WEST's request. US WEST has substantial market power creating significant short and long-term competitive concerns with the distinct possibility that a successful predation strategy may leave Phoenix MSA customers with only one provider -- US WEST. Therefore, the grant of this petition cannot be in the public interest and should be denied.

Respectfully submitted,



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Certificate of Service

I, Barry Pineles, Regulatory Counsel for GST Telecom Inc. have caused to be mailed on this 6th day of October, postage prepaid, a true and correct copy of this Comments in Opposition to the Petition for Forbearance to the following:

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